United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7423

To be argued by:
WILLIAM F. LARKIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

MARY ANNE GUITAR,
Plaintiff-Appellant,

against

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE BROADCASTING CO., INC. (Del.), H. PAUL JEFFERS, ROBERT MARTIN CORPORATION, ROBERT WEINBERG, MARTIN BERGER, JOHN YOTTES, MARGARET MIGLIORE SCHNEIDER and GERALD DAVID LLOYD,
Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES ROBERT MARTIN CORPORATION, ROBERT WEINBERG AND MARTIN BERGER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

MARY ANNE GUITAR,

Plaintiff-Appellant,

against

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Facts

The plaintiff asserts that she has been a free-lance writer for over five years (A-7*) and a published book author (A-8). Page 11 of appellant's brief as well as the exhibits on the appendix and her own deposition confirm that she is an elected public official, a public speaker, an activist in

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* Figures in parentheses refer to page numbers in Appendix.

civic affairs and an editor and writer for public consumption (A-193-A-213, A-240-A-242).

Robert Martin Corporation (hereinafter called Martin) is a real estate developer (A-29) which was engaged in a plan to develop an area called Tarrygreen in the Town of Greenburgh, New York (A-31). In the end of November or the beginning of December, 1972, the president of Martin engaged John Yottes and his company, Talent Unlimited, Inc., as a public relations consultant (A-33, A-34). Martin's president did not know and had never been informed before the commencement of this action that Yottes had ever worked for station WINS (A-50, A-51). Yottes was engaged to and did help Martin prepare for a public hearing to be held in the Town Hall of the Town of Greenburgh on December 20, 1972 on the subject of the Tarrygreen plan (A-33).

The president of Martin, Martin S. Berger, had read a copy of the book *Property Power* written by the plaintiff Mary Anne Guitar a few months prior to December 13, 1972 and he might have had a copy of *Mademoiselle* containing a review of that book (A-240) at the same time (A-60-A-61).

The president of Martin was aware of a public meeting which was held in the Town of Irvington on Wednesday, December 13th, on the subject of the Tarrygreen Development. Gerald Lloyd, Martin's vice-president, and Berger's personal secretary attended that meeting (A-34, A-37). Lloyd took notes of the comments of the several speakers there, including those of the plaintiff, and his secretary transcribed them (A-34, A-37). Martin's president received a verbal report of the December 13th meeting the next day and he believed Lloyd's secretary transcribed his notes and delivered them on the same day (A-37). These notes are Exhibit L (A-233-A-239). Yottes had nothing to do with the December 13th meeting (A-34). After that December 13th meeting, Berger had ordered copies of all the reviews of the book *Property Power* (A-61-A-64).

On December 15th arrangements were made for a presentation brunch meeting at Holiday Inn in Elmsford to which about twenty-five persons from the greater Greenburgh community were invited. Berger, his private secretary, Robert Weinberg, the chairman of Martin's board of directors (A-30), Gerald Lloyd and John Yottes attended that meeting (A-39-A-42). The purpose of the meeting was to present the merits of the Tarrygreen plan to a number of concerned members of the community (A-44). Either at the brunch meeting or sometime soon thereafter Yottes made mention to Berger of a broadcast of a book review on December 17th over WINS (A-46-A-47). Berger had not himself heard this broadcast (A-67). Yottes had either a tape or a transcript of the book review when he talked to Berger of this broadcast (A-67). Berger decided it would be advantageous to reprint and circulate the broadcast (A-47). He received a copy of it from Yottes and had it reprinted by someone on the office staff (A-48-A-49). Berger had no recollection of the original transcript from which the printing was made (A-48-A-49). However, he identified plaintiff's Exhibit 4 for identification as the printed document which was public (A-51).

In addition to the book review on the printed document, Berger authored the balance of its contents (A-52). This consisted of:

> "Ms. Guitar quotes:
>
> " 'My role is to make you feel less guilty about wanting to preserve your wooded boundaries and keep all newcomers out at all costs.
>
> " 'City people should be made to stay in the city.
>
> " 'The City should not be robbed of its livelihood by enticing industry to the suburbs.
>
> " 'I would be happy to throw sand in the wheels of progress.' "

The first quote was derived from the notes made of the plaintiff's public statement on the December 13th Irvington meeting (A-52-A-53) in which she said:

> "I consider my role to be to do a little conscience raising to make you all feel less guilty. When you bought you bought more than a house you bought an environment and you are entitled to it. This tract is the last piece of green you have you must preserve it at all costs.
>
> "Don't feel guilty—don't let them make you feel guilty. You have equity in your environment. You have some rights—don't let an outsider take them away from you. Developers should be forced to live in this kind of mini-city to be punished for their wrong doing." (A-233)

For the quote "City people should be made to stay in the city," Berger's derivation was from those same notes (A-53-A-54).

> "We should keep the plants in the cities. Everybody would be better off. We can be the green belts for the denser area. Let's not move the city to the country." (A-235)
>
> " * * * let's not move the city to the country." (A-239)

Berger relied on page 264, paragraph 3, of *Property Power* authored by the plaintiff as the source of the quote "The City should not be robbed of its livelihood by enticing industry to the suburbs" (A-54-A-55). The plaintiff did not take issue with the substantive accuracy of the source of this quote (A-205, A-318).

The quote "I would be happy to throw sand in the wheels of progress" was derived from a publication of an article

authored by the plaintiff in *Mademoiselle* magazine, June issue (A-55-A-56), where it stated:

> "I have been a strong advocate of land preservation, been vocally opposed to 'mindless growth' and left little doubt that, if elected, I would be happy to throw sand in the wheels of 'progress'." (A-240)

In addition to the above printed document, an illustrative map of the Tarrygreen development plan, a brochure of the project and an article published in the *Daily News* were distributed by Martin at the December 20, 1972 Town of Greenburgh Planning Board public meeting (A-33, A-69-A-70) which Planning Board was to pass on or reject the Tarrygreen plan (A-66-A-67).

On the order of the Court responding to plaintiff's insistence upon having the questions answered, Berger testified that from his reading of the book *Property Power* he would generally construe it as amounting to a handbook of how to keep others out, without his being able to give specific quotations to demonstrate that impression, his not having read the book for some time before (A-77-A-82).

This appellee relies on the District Court Judge's quotation from excerpts from the book *Property Power* (A-322-A-324 footnote #11) as substantiation for his judicial opinion that the tenor of the book justifies Berger's interpretation.

The plaintiff does not dispute the fact that she was one of the public speakers at the Town of Irvington meeting on December 13, 1972 on the subject of the Tarrygreen development (A-206) where notes were made of her remarks against the plan (A-233-A-239). Nowhere in this record on appeal has the author of this brief found any evidence, either by way of an affidavit of the plaintiff herself or of anyone who heard her speak at the December 13th meeting, of what plaintiff contends she said there.

H. Paul Jeffers' affidavit states that from June 1, 1969 until January 13, 1973 he was employed as a news editor for WINS (A-132) and that after he had read a related article in the *New York Times* he decided to and did tape a review of the book *Property Power* which he had previously read to be broadcast as a timely item of interest. He stated that he received only a $20.00 talent fee from WINS therefor, the review was entirely from the book and the cover sheet thereof and was his singular effort made without any consultation, advice, suggestion or even knowledge of any of the parties involved in this litigation (A-133-A-134).

The affidavit of John Yottes states that prior to December 1, 1972 and after January, 1973, he was employed by WINS as a casual employee but did no work for them from December 3, 1972 to February 2, 1973. Late in 1972 he was retained by Martin to do public relations work for it in reference to the Tarrygreen project. He said he knew Jeffers but he did not participate or communicate in any way with Jeffers in connection with the subject book review. On the morning of December 17, 1972 he heard a broadcast of the book review of *Property Power* and, knowing the author as the plaintiff herein who spoke at the above December 13th public meeting, he ascertained that there would be a re-broadcast of the same review later that day. Accordingly, he taped it then and gave the transcript thereof to Martin. Yottes asserted that he had nothing else to do with this transcript and only saw it again on December 20th as incorporated as a purported reprint in the paper distributed by Martin at the Greenburgh Planning Board public meeting (A-182-A-184).

The District Court found that the variations claimed between the actual book review and the reprint thereof were not significant (A-320). They consisted of leaving out in the reprint the word "fresh" from "fresh country air",

the word "seeming" from "What bothers me about *Property Power* is the seeming hypocrisy of it" and the words "I'm afraid it's" from the clause "Mary Anne Guitar's *Property Power* is a blueprint for exclusion . . . and, if followed, I'm afraid it's a blueprint for stagnation in the suburbs."

POINT I

The contents of the paper circulated were not actionable.

The reviewer of Mary Anne Guitar's book *Property Power*, defendant H. Paul Jeffers, the defendant Martin Berger and the District Court Judge, who all read the publication, came to the same conclusion that the said book reflects and conveys the impression that it is what amounts to a format or handbook for "keeping others out," whether they be residents or industrial development, out of the suburbs. This conclusion was based upon sound foundation of excerpts taken by the Court from the book. Since the District Court Judge impartially construed the book to have the same meaning as Berger and Jeffers derived from it, it should be conclusive that such construction is one of the meanings, if not the only meaning, a reasonable person could draw from a reading of this book. It is submitted that the reasonableness of construction cannot be measured by the meaning the author intended or even what a juror might infer from the work (*Foley* v. *Press Publishing Co.*, 226 App. Div. 535, 547).

The plaintiff-appellant does not deny the existence of those facts in the book from which this construction was derived. Instead, she states that the meaning of the book as she intended it cannot be ascertained from the excerpts taken from the book itself but should be gleaned from the acknowledgments and bibliography in the back of the volume (page 8 of appellant's brief). The attempt by the

appellant to unilaterally change the plain meaning of the words cannot be accepted.

> "The exhibit thus made part of the complaint supersedes conclusory allegations of the complaint itself, and if there is any variance between the complaint and the exhibit as to what was said and what happened, the exhibit controls. (*Sardone* v. *Joseph Diamond Holding Co., Inc.*, 244 App. Div. 30[illegible]03; *Rubin* v. *Siegel*, 188 App. Div. 636, 638.)" *Salomon* v. *Mahoney*, 271 App. Div. 478, 479.

Th[illegible]sentation by the appellant both in her brief here and [illegible] motion does demonstrate one thing. It shows that [illegible] book was conveying a message of exclusion of others from the suburbs under the guise of projecting conservation and environment. That brings the book within the sphere of hypocrisy as it was reasonably evaluated in the book review.

Thus, there were the uncontroverted facts contained in the book *Property Power* and the comment and the conclusion of the book reviewer which the Court found was fair comment and an honest expression of the book reviewer's real opinion, which opinion any reader of the book could glean from it (*Briarcliff Lodge Hotel* v. *Citizens-Sentinel Publishers*, 260 N. Y. 106, 118). Fair comment and criticism of plaintiff's public writings and utterances is a complete defense to a claimed libelous publication (*Julian* v. *American Business Consultants, Inc.*, 2 N. Y. 2d 1, 7-10).

The plaintiff-appellant unequivocally states that she is an author of the published work, *Property Power*, and a public speaker who has expressed herself on public issues in general and the Tarrygreen plant in particular. She never denied that she had vocalized publicly on the very "Tarrygreen" development plan which is the nub of this action

at a public hearing on December 13, 1972, seven days before the publication in issue.

Of the four quotes attributed to the plaintiff herein by Martin's president in his printed throw-away, the plaintiff has no complaint of the one "The City should not be robbed of its livelihood by enticing industry to the suburbs" (A-205, A-318). Another such quote, "I would be happy to throw sand in the wheels of progress," she does not deny were the words found in her article published in *Mademoiselle* (A-240), but she insists that by putting the word "progress" in quotes she intended to equate "progress" with "mindless growth" (A-204). If such were her private intent, there is nothing in her article which conveys that thought. The next quotations, "City people should be made to stay in the city" and "My role is to make you feel less guilty about wanting to preserve your wooded boundaries and keep all newcomers out", she denied ever having said in words or substance in her book or in public speeches (A-202-A-203). However, the excerpts from *Property Power,* which the Court referred to in its opinion, overwhelmingly portrays the spirit and substance of the quotes (A-322-A-324). Moreover, there are the notes sworn to have been accurately made by Lloyd of the plaintiff's public comments at the December 13, 1972 meeting (A-233-A-238) which form the basis of the "quotes" in Martin's paper. The plaintiff's assertion that she never made such statements as were recorded by Lloyd of her December 13th public remarks was not enough to establish the contrary. She had the duty to come forward with what she said there in evidentiary form (*Kramer* v. *Harris,* 9 AD 2nd 282, 283). It is true that the published quotations were not verbatim from the notes, but the essence of the plaintiff's intent is found in those quotations.

> "And a fair and true report admits of some liberality; the exact words of every proceeding need not be

> given if the substance be substantially stated . . . Mere exaggeration slight irony or wit, or all of those delightful touches of style . . . do not push beyond the limitations of fair comment. Facts do not cease to be facts because they are mixed with fair and expectant comment of the story teller, who adds to the recital, a little touch by his piquant pen." *Briarcliff Lodge Hotel* v. *Citizens-Sentinel Publishers, Inc.*, 260 N. Y. 106, 118-119.

Lloyd took notes of the plaintiff's comments at the public meeting of December 13, 1972 and Berger extracted the substance therefrom. The product not only reflected the substance of the notes but conformed to the spirit and intent of the message or one of the messages portrayed in *Property Power*.

In *Pauling* v. *National Review, Inc.*, 22 N. Y. 2d 818, it was held:

> "The statements which they made concerned one who, concededly, was and is a 'public figure'. (See *Curtis Pub. Co.* v. *Butts*, 388 U. S. 130, 162, 87 S. Ct. 1975, 18 L. Ed. 2d 1094.) Accordingly, we need go no further than to say that we find, as did the courts below, that the plaintiff failed to establish the fact, essential to the cause of action, that the defendants published the statements in question either with 'knowledge' of their falsity or with 'reckless disregard' of whether they were true or false (*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686; see, also, *Pickering* v. *Board of Educ.*, 391 U. S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811) or with a 'high degree of awareness' of their probable falsity (*Garrison* v. *State of Louisiana*, 379 U. S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125) or that the defendants 'in fact' entertained 'serious doubts' as to their truth. (*St. Amant* v. *Thompson*, 390 U. S. 727, 731,

88 S. Ct. 1323, 20 L. Ed. 2d 262 [decided April 29, 1968].)"

It is submitted, further, that, on its face, the absence of the words "fresh", "seeming" and "I'm afraid it's" from the finished reprint in no way changes the intent or meaning of the book review as printed. Also, as stated by the District Court in its opinion, the plain reading of the cover sheet, cover and title page of the book in issue has to convey the thought [illegible]Property Power" constitutes the title of this book [illegible] the title does not include the descriptive verbiage ther[illegible]er (A-316-A-317).

POINT II

Fair comment and constitutional privilege is appropriate here.

The plaintiff admitted to having spoken on the Save I[illegible]ington Committee public hearing on December 13, 1972 as a strong antagonist of the "Tarrygreen" project (A-205-A-206). Her invitation had to have been the result of her prominence and influence as the author of *Property Power,* as a public office holder and as an influential local public speaker. On behalf of Martin in the advocacy and protection of its development plan which would eventuate in a community improvement, the officers of Martin were certainly entitled to show the full import of her statement and their inconsistencies with her avowed standards and the public's natural motivations. The plaintiff spoke with persuasiveness and apparent authority as a public advocate and a person of fame and standing in the community on a subject of local community interest. She was a public figure and her utterances are entitled to be criticized to show weakness or fallacy and are protected by the First Amendment (*Goldwater* v. *Ginsburg*, 414 F. 2d 324, 335; *Gertz* v. *Robert Welch, Inc.*, 42 U. S. L. W.

5123 [June 26, 1974]). A critic of the statements made by a public figure, especially where that critic or his publicized community improvement plans are attacked by such statements, cannot be reduced to silence for fear that the author of the statement criticized might make a groundless claim that an attack on her statements somehow reflects on its author (*Berg* v. *Printer's Ink Pub. Co., Inc.*, 54 F. Supp. 795, 797).

> "However, such necessary implications of comments directed at the work itself are not sufficient to turn otherwise protected criticism into unprotected criticism. If the rule were otherwise, the privilege of fair comment would cease to exist" *Buckley* v. *Vidal*, 327 F. Supp. 1051, 1053.

Martin was the sponsor of a community development plan and project. This was opposed by certain local factions who used the preeminence of the plaintiff's name and word to project their position that this was detrimental to the community. In the protection of Martin's own interests and integrity and to show that the proposed development was in the public interest, it had the right to publish the weakness, inconsistencies and irrationality of the thoughts, arguments and impressions conveyed by the plaintiff to the public so that the plan could be evaluated objectively on its merits. The contents of the paper Martin circulated have to be seen to be a fair and substantial representation of what the plaintiff had previously uttered and a proper criticism thereof as irreconcilable with the norm.

In *Trim-A-Way Figure Contour* v. *National Better Business Bureau*, 37 A. D. 2d 43, 45, the Court quoted from Restatement of the Law of Torts (Vol. 3, p. 240):

> "Occasions conditionally privileged afford a protection based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection

of one's own interests, the interests of third persons, or certain interests of the public. In order that such information may be freely given, it is necessary to afford protection against liability for misinformation given in an honest and reasonable effort to protect or advance the interest in question. Were such protection not given, true information which should be given or received would not be communicated through fear of the persons capable of giving it that they would be held liable in an action of defamation unless they could meet the heavy burden of satisfying a jury that their statements were true."

"If the public is to be aided in forming its judgment on matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudicial, be privileged." *Berg* v. *Printer's Ink Publishing Co.*, 54 F. Supp. 795, 797 (SDNY, 1943).

"When an author submits his work to the public he must, of necessity, expect criticism of that work. He is said, in fact, to invite criticism, and no matter how hostile such criticism may be, the critic enjoys a privilege to make such critical comments as long as the comment does not go beyond the published work itself to attack the author personally, *Berg* v. *Printer's Ink Pub. Co.*, 54 F. Supp. 795 (D. C., 1943); the facts are truly stated, *Shenkman* v. *O'Malley*, 2 A. D. 2d 567, 157 N. Y. S. 2d 290 (1956); the comment is fair, *Triggs* v. *Sun Printing and Publishing Assn.*, 179 N. Y. 144, 71 N. E. 739 (1904); and the comment is an honest expression of the writer's real opinion, *Briarcliff Lodge Hotel* v. *Citizen-Sentinel Publishers*, 260 N. Y. 106, 183 N. E. 193 (1932); *Hoeppner* v. *Dunkirk Printing Co.*, 254 N. Y. 95, 172 N. E. 139 (1930); I Harper & James, The Law of Torts, § 5.28 at p. 457." *Buckley* v. *Vidal*, 327 F. Supp. 1051, 1052-1053 (SDNY, 1971).

POINT III

Summary judgment was proper.

In their motion for summary judgment, the defendants established *prima facie* that their publication was privileged and that the plaintiff's claim of libel here was not viable. The plaintiff then had the burden of proving the merits of the action she brought.

> "The publication being presumptively privileged, when challenged by defendant's motion for summary judgment plaintiff was required to come forward with evidentiary facts from which it might be found that the publication was not only false but actuated by express malice or actual ill-will. (*Shapiro,* supra, p. 61; *Indig* v. *Finkelstein,* 29 A. D. 2d 851, affd. 23 N. Y. 2d 728)." *Trim-A-Way Figure Contour* v. *National Better Business Bureau,* 37 A. D. 2d 43, 45.

The plaintiff had the duty of producing actual probative facts sufficient to sustain a question of fact.

> "In examining that affidavit we remind ourselves that there is a positive requirement that it must show evidentiary facts (*O'Meara Co.* v. *National Park Bank of New York,* 239 N. Y. 386, 395) and that a motion for summary judgment may not be defeated by charges 'based upon surmise, conjecture and suspicion' (*Bank for Savings in City of New York* v. *Rellim Const. Co.,* 285 N. Y. 708-709)." *Shapiro* v. *Health Insurance Plan of Greater New York,* 7 N. Y. 2d 56, 63.

The plaintiff argues that there was a conspiracy among the several defendants to develop the material to form the contents of the paper which Martin circulated and, upon that premise, she wished the conclusion of malice to be inferred.

The defendants, Yottes and Jeffers, stated frankly under oath the extent which their several independent activities fitted into the composite picture of the events. Each categorically stated that they had no communication or relationship with each other. Each disclaimed any conduct related to a conspiracy in the performance of their respective unrelated acts (A-131-A-134, A-182-A-184). Similarly, the affidavits and depositions of all of the other defendants related their respective roles in the sequence of events as they pertained to this litigation and absolutely denied any conspiracy or collusion or conspiracy to manufacture the subject matter contained in Martin's published paper.

The plaintiff-appellee, both on the motion and in her brief on this appeal, presented no evidence to support her contention of a conspiracy. Instead, plaintiff placed the events in chronological order (pp. 14-16 of the brief) and then proceeded to infer that the chain of events constituted "incredible coincidences" (p. 17 of brief); that the fact that each of the Martin officers and employees did not communicate on each and every detail of their actions with each other was unbelievable (pp. 19-20 of brief); that the manner in which Yottes obtained the transcript of the book review and the circumstances under which Jeffers made it were conjecturally improbable (pp. 22-23 of brief); that the fact that in the normal office operation Berger or someone in Martin discarded and did not retain Yottes' copy of the book review as superfluous after it was printed was somehow suspect (pp. 24-27 of brief); that the fact that Yottes knew Jeffers and had formerly worked for WINS leads to the suspicion that he could have obtained a copy of the book review from him without waiting for its re-broadcast (pp. 23, 27-28 of brief); that the fact of Jeffers' delay in making the book review until six months after its publication (pp. 28-30 of brief) and the fact that Jeffers bought the book for this review and only once before used disparaging language in a

review (pp. 30-34 of brief) was the basis for speculation that this was not a *bona fide* book review.

This amounts to pure conjecture and is the product of a fertile, imaginative mind's creation of a plot out of a perfectly innocent series of events. Given the undisputed recitation of each of the defendants' conduct and their sworn testimony that there was no collusion, conspiracy or even correspondence with the creator of the book review in issue, the plaintiff's presentation on the motion did satisfy her legal burden of coming forward with evidence to substantiate her claim (*Morgan* v. *Sylvester,* 125 F.Supp. 380, 389-390 [SDNY, 1954], affd. 220 F. 2nd 758, cert. den. 350 U.S. 867).

Even if the unsupported suspicions of the plaintiff, unopposed, were to be sufficient to support a finding of conspiracy, the controverting proof submitted by the defendant would denominate it as inadequate.

> "In this case the only evidence of conspiracy was circumstantial. Therefore, the facts proven must exclude to a moral certainty every hypothesis except that of the crime charged and they must be inconsistent with innocence (*People* v. *Weiss,* 290 N. Y. 160, 163)." *People* v. *Mackell,* 47 A. D. 2d 209.

It is basic that circumstantial evidence must rely upon proof, not suspicions of collateral facts from which the fact or facts in issue may indirectly be established (Richardson on Evidence [10th Ed.] #145; 29 American Jurisprudence 2nd, Evidence #264).

Here, the plaintiff wishes the Court to infer from her unsupported speculation that there was a conspiracy and from that to further infer that there was malice. The plaintiff cannot fill the void in her proof with such pyramiding of inferences (*Wolfson* v. *Metropolitan Life Ins. Co.,* 262 App. Div. 886).

Likewise, the plaintiff's bare assertion that she never made, in words or substance, any of the statements recorded by Lloyd of her December 13th public hearing remarks (A-204-A-205) is totally inadequate on a summary judgment motion to refute the sworn testimony attesting to their accuracy. In view of the fact that Mary Anne Guitar admitted to having spoken publicly at the December 13th meeting, she had the burden of coming forward with probative evidence of what she said at that meeting in order for the Court to ascertain the accuracy of the notes Lloyd made of her words.

> "It is not enough that a defendant deny a plaintiff's presentation in summary judgment. He must state his version, and he must do so in evidentiary form (*O'Meara Co.* v. *National Park Bank,* 239 N.Y. 386, 395; *Dodwell & Co. Ltd.* v. *Silverman,* 234 App. Div. 362). This is what is lacking in this case." *Kramer* v. *Harris,* 9 A.D. 2d 282.

POINT IV

There is no viable claim for statutory violation.

Appellant has no cause of action based upon a claim of violation of the Communications Act.

The appellees herein rely upon the Court's opinion (A-333-A-342) for their position that appellant does not have any private right of action based on conspiracy to violate 47 U.S.C. § 317, 501, 502, 503 and 508 of the Federal Communications Act of 1934 as amended.

In addition, there is absolutely no evidence of a violation which could remotely bring these facts within the purview of the Act.

CONCLUSION

The judgment on appeal should be affirmed.

Respectfully submitted,

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376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GUITAR

VS

WESTINGHOUSE ELECTRIC ET AL.

Def-appellees

State of New York, County of New York, ss.:

Harold Dudash

agent for Wm. F. LArkin/N. D'Onofrio, attorneys for def-appellees being duly sworn deposes and says that he is the attorney for the above named herein. That he is over 21 years of age, is not a party to the action and resides at 2346 Holland avenue Bronx, N.Y.

That on the 18th day of November, 1975 19 , he served the within

brief for Defendats-appellees R. Martin corp, R. Weinberg & Martin Berger

upon the attorneys for the parties and at the addresses as specified below

Cerchiara & Cerchiara, atty's for Yottes, 145 Mount Vernon Avenue , Mt Vernon, NY

by depositing two copies

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 18th day of November, 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509105
Qualified in Delaware County
Commission Expires March 30, 1977

Harold Dudash

 The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

GUITAR

VS

WESTINGHOUSE ET A AL

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

BERNARD GREENBERG being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 E 7th NY, NY

That on the 18th day of November, 1975, 1975

he served the annexed brief fo def-appellees R. Martin Corp, R. Weinberg & M. Berger upon

UP(N:

Windels & Marx, attorneys for plaintiff-appellant, 51 WEST 51st STREET, NY, NY

Townley, Updike, Carter & Rogers, atty's for Westinghouse, 220 EAST 42nd STREET NY, NY

F. V. MINA, atty for schneider, 217 Broadway, NY, NY

in this action, by delivering to and leaving with said attorneys

two ~~three~~ true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 18th

day of November, 1975, 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. [illegible]
Qualified in Delaware County
Commission Expires March 30, 19 77

} Gerard S Greenley